



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 4, 1998

Mr. Arturo D. Rodriguez, Jr.  
Assistant City Attorney  
City of Georgetown  
P.O. Box 409  
Georgetown, Texas 78627-0409

OR98-2951

Dear Mr. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120089.

The City of Georgetown (the "city") received a request for the following information:

- 1) All the Daily Receipt Reports that log credit card, cash, or charges with invoice numbers regarding fuel transactions at the City of Georgetown Airport.
- 2) All the 3 X 5 daily records of gallon amount, aircraft registration number and which pump was used.
- 3) Every invoice and every credit card transaction that the City of Georgetown has made regarding fuel sales or transactions at the City of Georgetown Airport.

You contend that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed a representative sample of the documents at issue.<sup>1</sup>

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The submitted documents contain credit card numbers and credit card expiration dates for transactions in which private parties used credit cards to purchase fuel from the city airport. You argue that this information is excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy. We agree.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the common-law right to privacy. Information is protected by the common-law right to privacy if (1) the information is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992).

This office has found that the following types of information are protected by the common-law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987). We agree that the credit card numbers and credit card expiration dates on fuel receipts are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. We have marked this information accordingly.

Next, you contend that the amount of fuel purchased for a particular airplane is excepted from disclosure under sections 552.104 and 552.110 because the disclosure of this information would harm the competitive interests of both the city and the third parties that purchase fuel from the city.<sup>2</sup> Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks

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<sup>2</sup>You raise both sections 552.104 and 552.110 to protect the city's competitive interests. However, because the specific purpose of section 552.104 is to protect the competitive interests of governmental bodies, we will consider your arguments on behalf of the city under section 552.104. *See* Open Records Decision Nos. 590 (1991), 568 (1990) (attorney general did not apply section 552.110 to information generated and maintained by governmental body but not obtained from third parties).

protection as a competitor, however, we have stated that it must be afforded the right to claim the “competitive advantage” aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

You generally allege that disclosing information about fuel purchases for particular airplanes will harm the city’s competitive interests. You have not provided us with specific facts or arguments to support this allegation. Therefore, we find that this information is not excepted from disclosure pursuant to section 552.104.

Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as well as the Restatement’s list of six trade secret factors.

RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 at 4 (1996). To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

We have reviewed your arguments on behalf of third party customers of the city airport. We conclude that you have not established that any of the information relating to fuel purchases should be withheld from disclosure under section 552.110 as either trade secrets or commercial or financial information. Therefore, with the exception of the credit card numbers and credit card expiration dates that are protected by section 552.101, the information at issue must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

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<sup>3</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Karen Hattaway". The signature is fluid and cursive, with the first name "Karen" and last name "Hattaway" clearly distinguishable.

Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 120089

Enclosures: Marked documents

cc: Ms. Beth Ann Jenkins  
Pilot's Choice Aviation, Inc.  
209 Corsair  
Georgetown, Texas 78628  
(w/o enclosures)